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formance of said requirement, and a failure to object to such evidence is usually regarded as a waiver of the benefit of the requirement.

It becomes unnecessary to consider the questions arising out of the second trial of the case, as we are, for the reasons stated, of opinion that the lower court erred in setting aside the verdict of the jury at the first trial, and that ruling will be reversed and annulled, and this court will enter the judgment the lower court should have entered, in favor of defendant in error against plaintiff in error for the damages ascertained by the jury, with interest, as stated in their verdict.

BOARD OF SUP'RS OF NOTTOWAY COUNTY *v.* POWELL.

March 21, 1907.

[56 S. E. 812.]

1. Taxation—Delinquent Personal Taxes—Duties of County Treasurer—Return of Tax Tickets.—Code 1887, § 605 [Va. Code 1904, p. 300], provides that the treasurer, after ascertaining which of the taxes and levies assessed in his county or city cannot be collected, shall make a list of such of the taxes and levies other than on real estate. Section 608 [page 301] provides for the examination of the list by the county or corporation or hustings court, and for the certification by the clerk of copies thereof to the auditor of public accounts, etc., the original lists and the tickets for taxes and levies corresponding therewith to be preserved by the clerk, and that the treasurer shall not receive any of the taxes or levies mentioned in such list, but they may be paid into the public treasury, the auditor, when such delinquent taxes are received by him under section 612 [page 303], to credit the respective counties and cities with the amount of county and city levies, etc. Section 612 provides that the auditor shall place certified copies of the list in the hands of any sheriff, etc. (except that it shall not be given to any officer who returned it), who shall collect the same, accounting to the auditor therefor. Held, that a county treasurer was liable under such sections for all money received by him on tax tickets contained in the delinquent lists, for which he had already obtained credit.

2. Same—Liability of Treasurer.—Until and unless the original tax tickets for delinquent taxes were filed with the clerk as required by Code 1887, § 608 [Va. Code 1904, p. 301], a county treasurer was not entitled to receive credit by any delinquent taxes.

3. Same—Recovery of Taxes Wrongfully Collected by Treasurer—Bill—By Whom Brought.—The board of supervisors of the county was entitled to maintain a bill to recover all moneys received by the

treasurer on tax tickets contained in the delinquent lists, and to have a reference to a commissioner in chancery with regard to such tickets and collections.

4. Same—Statutory Provisions—Application.—Code 1887, § 612 [Va. Code 1904, p. 303], and cognate sections, providing for the collection of delinquent taxes, apply only to cases in which the lists have been returned by the treasurer in good faith in conformity to law, and afford no remedy against a treasurer who has ex maleficio collected tax tickets.

5. Same—Pleading—Sufficiency of Bill.—Code 1887, § 636 [Va. Code 1904, p. 311], provides for a lien on real estate for taxes thereon, and makes it the duty of the auditor of public accounts to keep a record of all real estate returned delinquent. Section 637 [page 312] requires a copy of the delinquent list to be delivered to treasurers, who within 30 days thereafter must advertise the property for sale, etc., and, by section 638 [page 313], the treasurers are required to make sale. Section 642 [page 314] requires treasurers to report to the circuit court of the county, etc., all lands sold by them and also a list of all persons whose lands have been returned delinquent and who have paid such delinquent taxes prior to sale. Section 647 [page 316] directs the auditor, on receipt of a copy of the report, to charge the treasurer with whatever is due the commonwealth on account of sales so made by him less 10 per cent. commission, which amount the treasurer shall pay into the treasury, etc. Held, that a bill against a county treasurer to recover money alleged to have been collected by him on the delinquent list, failing to aver that any sale was made, or that any steps looking to a sale were taken by defendant, or that any part of the delinquent list was received as the result of a sale or as having been voluntarily paid by the taxpayer to prevent a sale, was insufficient.

6. Same—Nature of Action—Equity.—A bill against a county treasurer by the board of supervisors to recover excess collection charges made by defendant in collecting taxes, the exhibit filed with the bill showing the sums for each year on which the excessive commission was charged, presented a question for a court of law only.

7. Same.—A bill filed against a county treasurer by the board of supervisors, charging that defendant had not accounted for the penalty on delinquent taxes, but not alleging that he received any tax to which the penalty attached, was insufficient.

Keith, P., and Cardwell, J., dissenting in part.

Appeal from Circuit Court, Prince Edward County.

Bill by board of supervisors of Nottoway county against J. L. Powell. Decree for defendant, and plaintiff appeals. Reversed.

H. E. Lee and Caskie & Coleman, for appellant.

Meade Haskins and C. V. Meredith, for appellee.

KEITH, P. The board of supervisors of Nottoway county filed their bill against J. L. Powell, in which they aver that as treasurer of Nottoway county he collected the taxes and levies for the year 1891, and for each subsequent year, down to and including the year 1903, making from time to time statements thereof to the board of supervisors, which were approved by said board. The bill charges that these accounts were erroneous in the following particulars: That in each of the statements there appears a credit to the treasurer, "by amount vouchers presented by treasurer, examined by the board, found correct and filed in the records"; that included in this item was the amount of taxes for the year for which the accounts were being settled which were returned delinquent by the treasurer; that the treasurer was required by law to return with the delinquent list the original ticket for each and every item embraced in said list, and that in no instance was this requirement complied with, the treasurer failing to return said ticket or any of them; that this failure upon the part of the treasurer to file the ticket as required by law was not discovered until some time in the year 1903, when the board demanded of the treasurer that they should be filed; that after some delay the treasurer did deposit with the clerk some of said tickets, which he stated were all that were then in his possession, but an examination thereof disclosed the fact that a considerable number of the tickets embraced in the delinquent list had not been filed. With the bill is filed an exhibit, marked "A," showing the aggregate of the ticket for each year which were not deposited with the clerk as required by law, and the charge is that the treasurer was not entitled to receive credit for any delinquent taxes until and unless the original ticket was filed with the clerk. The bill further alleges that after the returns of delinquent taxes were made, and Powell had received credit for the delinquent list returned by him, he proceeded to collect from some of the persons embraced in such delinquent list amounts due by them, making out and delivering to them duplicate tickets for said sums. An exhibit, marked "B," is filed with the bill, containing a list of such collections as were within the knowledge of complainant. It is claimed that Powell is indebted to the county of Nottoway for the amount of the tickets not returned by him, with interest, and for the amount of all delinquent taxes collected by him, with the interest and penalties which the law imposes up to the time the same were so collected, and with interest upon the aggregate from the time of such collection until the same is paid over to the county.

It appears that the revenues of the county of Nottoway exceeded \$10,000 and were less than \$15,000. The compensation to the treasurer, as fixed by law, would be 5 per cent., with 2

per cent. added on all the taxes and levies remaining unpaid on December 1st and collected by him; and it is charged in the bill that Powell received and appropriated 3 per cent. instead of 2, and demand is made that he refund the excess of 1 per cent. An exhibit is filed with the bill showing the amounts collected upon which the excess of 1 per cent. commission was charged, making in the aggregate the sum of \$369.56 as the amount which the plaintiff is entitled to recover of the defendant under this head.

The bill further states that in the statement rendered by Powell as to the taxes for 1891, it does not appear what amount was collected prior to December 1st, and nothing is charged to him on account of the 5 per cent. penalty which was added to such part of said taxes as were not collected until after December 1st, and that Powell should be held accountable for said sum, with interest thereon from the date of said settlement.

The bill concludes with a prayer that the cause be referred to a commissioner to settle the accounts of Powell as treasurer of Nottoway county, to ascertain and report what sums are due and unpaid by him to the various funds which have passed through his hands, together with any other account which may be deemed right and proper; that he be required to produce before the commissioner all the books and papers in his possession which will show the items composing the various sums credited to him in the statements hereinbefore referred to, that any errors existing may be corrected; that the amount due by Powell to each of the funds which have passed through his hands may be ascertained and settled; that he may be required to pay the same, and for further and general relief.

To this bill the defendant demurred, and the circuit court of the county of Prince Edward, to which the case had been removed for trial, sustained the demurrer, and the case is before us on appeal.

In my view of the case the bill is in no sense a bill of discovery. It is to be considered as a bill to surcharge and falsify the accounts of Powell as treasurer of Nottoway county, which he had regularly settled from time to time, and which had been approved and confirmed by the board of supervisors, as provided by law.

In *Corbin v. Mills*, 19 Grat., at page 465, Judge Joynes, speaking of surcharge and falsification of the accounts of an executor, says that such as have "been regularly settled in the mode provided by law are to be taken as *prima facie* correct. 'They are liable to be impeached on specific grounds of surcharge or falsification to be alleged in the bill, but the court will not decree an account upon a general allegation that the settled accounts are

erroneous. This rule not only results from the presumption which the law makes in favor of the correctness of a settled account, but it is necessary to prevent surprise to defendants, and to give them the advantage of their answer, to which they are entitled, on the principles which govern equity practice. When an account has been ordered upon a proper bill an additional objection to the settled accounts may be discovered in the progress of the case." And with respect to these after-discovered errors, in order to save time and expense, the plaintiff is allowed to raise the objection before the commissioner with a proper specification in writing, and the defendant is allowed to meet the objection by proper affidavit, to which the same weight will be attached as would have been given to an answer if the matter had been alleged in the bill.

It becomes necessary to examine the specific grounds upon which it is sought to impeach the correctness of the accounts in this case. The first ground of attack is that the treasurer did not file the original tickets for the items embraced in the delinquent list for which he received credit. This, it may be conceded, was an irregularity in the accounts which should not have been passed, and the credit should not have been allowed by the board, and should not have been approved by the county court until the law was complied with, but, unless it is averred and proved that a loss resulted to the county from this failure to file the tickets, it cannot constitute in itself a ground of surcharge and falsification; for it will be presumed that each and every officer charged with a duty with respect to those accounts performed that duty, and that no credit was allowed except upon due proof. It is difficult to conceive how there could have been any loss of revenue to the county from this source, except in so far as it enabled the treasurer (upon the theory that he retained in his possession the original tax tickets embraced in the delinquent list) to collect the same after receiving credit for them as delinquent, in which event they would be the subject of consideration under the next head, which is that after the returns were made, and the treasurer had received credit by the delinquent list returned to him, he proceeded to collect from the persons embraced in such delinquent list amounts due by them, making out and delivering in most, if not all, cases, duplicate tickets for said sums. And this brings me to the consideration of the most important question embraced in this litigation.

Section 605 of the Code of Virginia of 1887 [Va. Code 1904, p. 300] provides that "the treasurer, after ascertaining which of the taxes and levies assessed in his county or city cannot be collected, shall, not later than the first day of July in each year, make out lists of three classes, to-wit: First, a list of property on the

commissioner's land-book improperly placed thereon or not ascertainable, with the amount of taxes and levies charged on such property; secondly, a list of other real estate which is delinquent for the nonpayment of the taxes and levies thereon; and, thirdly, a list of such of the taxes and levies so assessed other than on real estate as he is unable to collect. * * *

Section 608 [Va. Code 1904, p. 301] provides that each of the lists mentioned in 605 shall be presented to and examined by the county or corporation or hustings court, and that the court, being satisfied of the correctness of said list, and that the taxes and levies are correctly extended, shall direct the clerk to certify copies thereof to the auditor of public accounts, setting forth the aggregate amount of the state taxes shown by said list, to the Treasurer of the state, and a copy of said list to the commissioner of the revenue, who shall correct his books accordingly; but said lists shall not be presented to the court nor allowed unless they have been first submitted to the commissioner of the revenue for the county, district, or city to which they relate, and are accompanied by the written opinion of the commissioner touching the propriety of such lists, verified by his oath, and shall also have been submitted, in the case of a county treasurer, to the board of supervisors of said county, and are accompanied by the certificates of said board touching the propriety of such lists and each case therein contained. The original lists and the tickets for taxes and levies corresponding therewith shall be preserved by the clerk in his office. In order to obtain credit, therefore, for delinquent taxes, the treasurer must have his list approved by the commissioner of the revenue, by the board of supervisors, and finally by the court of the county, or the hustings or corporation court of the city. When all that is done and the copies are certified to the auditor, section 608 provides that the treasurer shall not receive any of the taxes or levies mentioned in the first and third lists, but they may be paid into the public treasury, and it shall be the duty of the auditor, when such delinquent taxes and levies are so paid or received by him under section 612 [Va. Code 1904, p. 303], to credit the respective counties and cities with the amount of county and city levies, respectively, and other local taxes, including, also, such as have been received for years previous, and pay the same over to the county or city treasurer upon an order of the board of supervisors of the county or the council of the city, or the capitation and personal property tax and levies may be paid to the clerk of the county or corporation or hustings court, who shall, in a book to be kept in his office for the purpose, enter the name of each person who pays any part of said taxes or levies the amount paid by him, and the date of such payment, and on the 1st day of June and December of each

year shall transmit to the auditor a copy of the entries so made, which shall be verified by his oath.

By section 612 it is provided that the auditor shall, within 60 days after receiving said third list, or as soon thereafter as practicable, place certified copies of the same in the hands of any sheriff, sergeant, constable, or collector (except that such lists shall not be placed in the hands of any officer who returned the same) who shall collect the same, giving to each person from whom such collection is made a receipt specifying the several items of taxes and levies so collected, and account to the auditor within one year after the list is placed in his hands.

There is no question here with respect to the first class mentioned in section 605. With respect to the third class, it plainly appears from the extracts given from sections 608 and 612 that after the delinquent list has been approved by the proper officials, and a copy transmitted to the auditor, that there is no power or authority left in the treasurer to collect any part of the taxes appearing upon said lists. Payment can only be made to the clerk, who, in turn, reports to the auditor, or to some person designated by the auditor under section 612 to receive them, whose duty it is also to report directly to the auditor. The auditor, by virtue of the exception contained in section 612, could not have authorized Powell to make collection of delinquent taxes. He is excluded in express terms from eligibility for selection by the auditor for that purpose. But it was argued that, having intruded himself into this business contrary to law, he became by operation of the doctrine applicable to executors de son tort and guardians de son tort responsible for the funds thus wrongly received. Let it be conceded. To whom would he be accountable? Not to those who were forbidden to receive them; but to those clothed by the law with the power and duty of collecting them. There was no lawful authority which could receive and give acquittance for taxes embraced in the delinquent list, except the auditor, some officer designated by him, or the clerk of the court, all of whom were required by express statute to report to the auditor. If, therefore, Powell, contrary to law, collected taxes embraced in a delinquent list for which he had already received credit, he should be held accountable, but accountable only to the official clothed by law with authority to receive such delinquent taxes.

What I have said sufficiently disposes of taxes on personal property, and brings me to a consideration of delinquent land taxes.

It is to be observed, in the first place, that the bill makes no discrimination with respect to land taxes and personal property taxes. For aught that appears in the bill, all the taxes upon the

delinquent list charged as improperly collected by the treasurer may have been upon personal property and the capitation tax, and, if that be so, then all that is stated in the bill upon this subject may be true, and yet give rise to no cause of action in favor of the plaintiff; for we believe it to be a rule, without exception, that a pleading is bad if it states a case which may be true without imposing liability upon the party sought to be charged.

But to deal more specifically with the subject: Section 636 [Va. Code 1904, p. 311] provides that "there shall be a lien upon all real estate for the taxes assessed, and county, city and town levies assessed thereon, and interest upon such taxes and levies, at the rate of six per centum per annum, from the fifteenth day of December, in the year in which the same may have been assessed, for the period of five years, unless sooner paid." And it is made the duty of the Auditor of Public Accounts to keep a record of all real estate which since the 10th of March, 1875, shall have been returned delinquent for nonpayment of taxes or county levies. By section 637 [Va. Code 1904, p. 312] clerks are required to deliver to treasurers a copy of the list of delinquent real estate at the time they certify the delinquent list to the Auditor of Public Accounts; and within 30 days after receiving such copy from the clerks the treasurer is required to advertise the property for sale, or so much thereof as may be necessary to pay the taxes on it. By section 638 [Va. Code 1904, p. 313] it is provided that, if the taxes, levies, interest, costs, and charges are not previously paid, the treasurer shall make sale. And by section 642 the treasurer of each county and city is required to make a report of sales made by him to the circuit court of the county, or the corporation or hustings court of his city, of all the lands sold by him, and also a list of all persons whose lands have been returned delinquent and who have paid such delinquent taxes or levies to such treasurer prior to such sale; and the clerk is required to indorse such payment upon the list in his office opposite the name of the taxpayer who is returned delinquent. By section 645 [Va. Code 1904, p. 315] the court, if it finds the list to be correct, confirms the report of the sales, and orders it to be recorded and indexed in the delinquent land book; and by section 647 [Va. Code 1904, p. 316] the clerk is required to certify a copy of this report to the auditor of public accounts within 30 days after the date of such confirmation by the court, and, upon receipt of the copy, the auditor is directed to charge the treasurer with whatever is due the commonwealth on account of sales so made by him, less 10 per cent. commission, which amount the treasurer shall pay into the treasury within 60 days from the date of sale. It is also made the duty of the clerk to lay a copy of said report before the board of supervisors of the county, and

in case of a sale for a city or town, before the council of such city or town, at the next meeting thereof, who shall charge the treasurer with whatever is due on account of said sales for levies, less a commission of 10 per cent.

Now, there is in this bill no suggestion that any sale was made or that any steps looking to a sale were taken by the defendant. There is no averment or suggestion that any part of the delinquent list which he is charged with having collected was received by him as the result of a sale of delinquent lands, or as having been voluntarily paid by the delinquent taxpayer in order to prevent a sale of his real estate. It may be, of course, that a part, or, indeed, all, of the taxes reported delinquent and subsequent to that report collected by the defendant, were for real estate, but the bill does not so state, and I repeat that every averment in the bill may be true, and yet impose no liability upon the defendant with respect to the collection of delinquent taxes; for non constat the whole of the taxes so collected were upon personal estate, which we have seen the treasurer had no authority to collect, and for which, if collected by him without authority, he is responsible, not to the plaintiff, but to the Auditor of Public Accounts. If he collected levies made by the county upon real estate, he would be, perhaps, responsible to the board of supervisors, if properly impleaded for the sums so collected, but as to this I express no opinion, as that case is not before us.

With respect to the charge made by the bill that the defendant collected 3 per cent., instead of 2 per cent., upon taxes and levies unpaid upon the 1st of December, standing alone this averment could not give jurisdiction to a court of equity. The exhibit filed with the bill shows the sums for each year upon which the excessive commission was charged, and involves no question which a court of law is not as competent to deal with as a court of equity. If the facts set forth in the bill with respect to his item are true, defendant would seem to be liable for the amount claimed, and he would, perhaps, be well advised were he to pay it without further controversy. But, if he has a defense not appearing upon this record, he has a right to make it before a jury.

Upon the remaining ground of surcharge and falsification stated in the bill, that the treasurer has not accounted for the 5 per cent. penalty on such part of the taxes for 1891 as were not collected until after December 1st, it is sufficient to say that the bill does not allege that there was any tax received by him to which such penalty was by law attached, and, there being no charge that he collected or should have collected a penalty of 5 per cent., except in a purely argumentative way, this item need not be further considered.

Without meaning at this time to say whether or not appellant can present a case of which a court of equity will take jurisdiction, I am of opinion the decree of the circuit court should be affirmed, but with leave to appellant to amend its bill, should it desire to do so, or to dismiss the suit without prejudice to its right to proceed at law.

Reversed.

CARDWELL, J., concurs in dissent.

WHITTLE, J. The court concurs in the dissenting opinion of the President to be handed down in this case, except with respect to the charges of the bill involving the alleged failure of the defendant in error, J. Powell, as treasurer of Nottoway county, to return with his delinquent lists the original tax tickets for each and all the items embraced therein, and to account for subsequent collections alleged to have been made by him on tax tickets included in such lists.

We are of opinion that the treasurer was not entitled to receive credit by any delinquent taxes until and unless the original tax tickets for such taxes were filed with the clerk, and also that he is liable for all moneys received by him on tax tickets contained in the delinquent lists. We are further of opinion that the plaintiff in error, the board of supervisors of Nottoway county, is entitled to maintain the bill in this aspect of the case, and, upon the exhibits filed therewith, to have a reference to a commissioner in chancery with regard to such tickets and collections, and to hold the treasurer responsible, to the extent of the county's interest therein, for all such tickets as were actually collected by him.

We are further of opinion that section 612, Va. Code 1904, and cognate sections, providing for the collection of delinquent taxes from taxpayers, apply only to cases in which the lists have been returned by the treasurer in good faith in conformity to law, and that they afforded no remedy against a treasurer who has ex maleficio collected tax tickets included in the delinquent lists. The board of supervisors can alone hold a treasurer responsible for such derelictions of duty so far as the county levy is concerned. The statutes invoked have no application to such case. They afforded remedies against delinquent taxpayers and their property, but none against a defaulting treasurer.

For these reasons, the decree sustaining the demurrer and dismissing the bill must be reversed, and the case remanded for further proceedings to be had therein, not in conflict with the views herein expressed.